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IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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October Term, 1986

No. _____

VICKIE LORENE ROCK.....Petitioner

vs.

STATE OF ARKANSAS.....Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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v.
STATE OF ARKANSAS

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Vicki Lorene Rock, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above-entitled case on April 21, 1986.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Arkansas is reported at 288 Ark. 566 and at 708 S.W.2d 78 and is printed in Appendix A hereto, infra, page i. The entry of judgment of the Circuit Court of Benton County, Arkansas, is printed in Appendix A hereto, infra, page xvi. The pre-trial order of the Circuit Court is printed in Appendix A hereto, infra, page xvii.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on April 21, 1986. A timely petition for rehearing was denied on May 27, 1986. The jurisdiction of the Supreme Court is invoked under 28 USCS §1257.

QUESTIONS PRESENTED

1. Whether Arkansas's rule of per se inadmissibility of hypnotically refreshed recollection violates due process of law when applied against a defendant in a criminal case whose defense necessarily depended on the recollection of and testimony concerning certain actions not remembered prior to the hypnotically induced refreshing of recol-

lection.

2. Given the constitutionality of limiting a defendant's testimony as to post-hypnotic remembrance, then whether the order of the trial court was unconstitutionally broad, thereby being too restrictive of defendant's testimony, resulting in a denial of due process of law.

3. Given the constitutionality of the limitation of a defendant's testimony with respect to post-hypnotic remembrances, then whether the trial court erred in making arbitrary and inconsistent applications of the rule, which resulted in a denial of due process of law.

STATUTE INVOLVED

Constitution of the United States

Amendment 14

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On July 2, 1983, Frank Rock died from a gunshot wound he received while trying to prevent his wife from leaving their apartment to get a hamburger. His wife, petitioner Vicki Lorene Rock was charged with manslaughter in connection with the death of her husband. Petitioner employed W.B. Putman, an able and experienced trial attorney, as lead counsel in the case. As petitioner could not recall important details regarding the gun discharging, at the suggestion of and through the arrangements by Mr. Putman, she submitted to hypnosis by Dr. Bettye Back, a licensed neuropsychologist, trained in the field of hypnosis, for the purpose of refreshing her memory. As a result of the second hypnotic session, petitioner was later able to recall that she did not put her finger on the trigger of the gun, and that the gun discharged completely by accident or mechanical failure of the safety as her husband grabbed her hand during the scuffle.

The prosecution made a pre-trial motion to exclude the petitioner's

testimony at the trial. A separate out-of-court hearing was held on the prosecution's motion, and at the conclusion of the hearing, the prosecution's motion was granted, and petitioner was ordered not to testify to any facts on the day of the shooting except "matters remembered and stated to the examiner prior to being placed under hypnosis." That hearing took place on November 26, 1984.

The trial began on December 4, 1984, and on December 6, 1984, the Court was advised of an irregularity in the jury. After a hearing in chambers where one juror was found to be impliedly biased, and upon motion by the state and by defendant, the Court declared a mistrial and reset a new trial for February 6, 1985. Six days later, on December 12, 1984, the lead defense counsel, Mr. W.B. Putman, died. The lead of petitioner's defense was assumed by Mr. Putman's partner, E.E. Maglothin, Jr., and his widow, Esther White, and the trial was recommenced on February 6, 1985.

During direct examination, the trial judge limited petitioner's testimony regarding the shooting to those statements contained in the psychologist's notes made immediately prior to the hypnosis. Petitioner was not permitted to relate to the jury the facts recalled after hypnosis or the facts previously remembered but not contained in the psychologist's notes. With the approval of the trial court, petitioner was examined directly from a copy of the psychologist's notes made prior to hypnosis, that procedure being apparently most consistent with the pre-trial order entered December 7, 1984.

Petitioner was convicted by the jury and sentenced by the Court to the maximum punishment allowed for the offense under Arkansas law. Petitioner appealed to the Supreme Court of Arkansas, and in the notice of appeal and designation of record, petitioner designated the entire record, "including but not limited to, all pleadings, motions, orders, exhibits, evidence and documents introduced or offered into evidence, instruction accepted, rejected and/or given, the proceedings and a transcription of the entire proceedings had in the trial Court in the above styled cause, excluding only Voir Dire, Opening Statement and Closing Arguments made to the jury by counsel." A transcription was made by the court reporter and lodged with the Supreme Court of Arkansas with the exception that the pre-trial hearing on the prosecution's motion to limit the petitioner's testimony was not included as part of the transcript. The Supreme Court of

Arkansas did not have before it the transcript of the extended hearing and testimony of the neuropsychologist.

The brief for petitioner made no attempt to correct or fill in the record pursuant to Rule 6(d) of the Rules of Appellate Procedure. No objection to the incompleteness of the transcript was made by the Attorney General nor was any attempt made to abstract that omitted portion of the transcript. By an opinion delivered April 21, 1986, the judgment of the trial court was affirmed without mention of the missing portion of the transcript. Timely petition for a rehearing was denied on May 27, 1986, again without mention of the omitted portion of the transcript either by counsel or by the Court. The pre-trial order of the trial court was included in the transcript and was abstracted on appeal.

The points raised here were specifically raised in a brief submitted to the trial court on October 22, 1984, prior to the entry of the order in question on December 7, 1984, and again in petitioner's brief to the Supreme Court of the State of Arkansas. The failure to transcribe the hearing upon which the restrictive order was based is noted here for the first time.

REASONS FOR GRANTING WRIT

The question of whether or not a criminal defendant may constitutionally have a right to testify limited because of a pre-trial hypnotic session or limited in the fashion done by the trial court in the instant case, appears to be a question not previously decided by the Court. In view of the increased use of hypnosis, both for pre-trial preparation by the defense and for witness identification and pre-trial preparation by the prosecution, the issue appears to be a matter of significant constitutional importance.

Petitioner's argument is threefold. First, the restriction on petitioner's right to testify as ordered in the case results in an unconstitutional limitation on petitioner's right to prepare her defense with her attorney, and her right to testify in the course of the trial as guaranteed by the due process clause of the Fourteenth Amendment. Second, assuming arguendo that some limitation may constitutionally be placed on a defendant's right to testify, then the limitation by the trial judge in the instant case to matters stated to and recorded by the hypnotist is too restrictive to be consistent with due process of law. Third, the proceedings against petitioner have lacked procedural due process

as a whole, taking into account all of the circumstances of the application of the pre-trial order of the Court during the trial of the cause and the decision on appeal.

The undisputed testimony of the psychologist in this case was that the purpose of the hypnosis session with petioner was for refreshing petitioner's memory, for the assistance of petitioner's attorney in understanding the case, and for trial preparation (Tr.pp.916-917). It would seem clear that the application of the trial court's restriction would have a far-reaching and adverse effect on a criminal defendant's right to effective counsel and to the proper preparation of his case, both of which are fundamental rights under the due process clause. *Glasser v. United States*, 315 U.S. 60 (1942). The right to counsel is clearly not perfunctory and includes the right to prepare. *In re Oliver*, 333 U.S. 257, (1948). It is certainly not a right of the state to have the defendant's testimony remain in the same form or be limited to what he recalled prior to meaningful consultation with his attorney. In practice, much of the time of the criminal trial attorney is spent reviewing facts with the defendant in order to see that details previously forgotten are remembered, and that defendant's recollection or version of the facts is presented not only correctly, but in a manner understandable to the trier of facts so that the defendant is not likely to be misunderstood or his testimony or recollection misconstrued. The correct trial preparation of a witness to testify is indeed an affirmative obligation of the attorney. The trial judge's decision in this case has the effect of saying to the defense attorney that if he uses certain methods for memory refreshment for the defendant, he may run the risk of preventing his client from testifying at all. The same argument used against hypnosis for memory recollection could be used against other schools of psychiatry or psychology which attempt to either improve or refresh a witness's memory without the use of hypnosis.

The principal objection to allowing peitioner to testify seems to be that after hypnosis she would invent memory rather than refresh what she really had, or that she cannot be cross-examined effectively because of the expertise of the hypnotist in some way shielding her mind from the rigors of cross-examination. Both of these aspects of the state's objection to the peitioner's testimony were dealt with in two classic writings on evidence.

In *Basic Problems of Evidence*, Edmund M. Morgan noted that a refreshment of recollection may be done in a number of ways, sometimes even by calling the attention of the witness to something that has no logical connection with the litigation, but most frequently by a writing, and that the danger of a writing is that the witness may substitute the contents of a writing for actual memory. In noting that to allow the trial judge to determine if the device of refreshing recollection is merely a subterfuge, Professor Morgan suggested that "Except in the most obvious cases, the memorandum will be used and the opponent's protection will lie only in cross examination. It must be said that in such situations intelligent cross-examination will usually easily disclose whether the witness is relying upon his present memory or upon the memorandum." Morgan, *Basic Problems of Evidence* (A.L.I.,1962), p. 62. Surely the same principal applies here. The danger to the testimony is the same; surely, in the context of due process, the test of intelligent cross-examination is a better means of dealing with invention of testimony under the guise of refreshing recollection than prohibiting the testimony.

The second aspect of the state's postion assumes that the hypnotist will not be a true expert, that through his expertise the hypnotist will improperly protect the witness from himself and make him cross-examination proof. This argument of course assumes an untruthful and devious hypnotist. The bias of experts is a long standing problem. As Professor Morgan pointed out: "The abuse of expert opinion evidence in modern litigation in criminal prosecutions ... has become in many states a scandal, for the expert witness has become in truth an advocate for the party who presents him, rather than as a witness." Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 Vand. L. Rev. 725 (1961). In the instant case, the testimony of an "expert" from the state medical examiners office clearly fell within that category when he changed his opinion after a lunch time conference with the prosecuting attorney. Yet no thought would be given to keeping the testimony out. In fact, the trial court allowed the state to reopen its case after resting to permit the change of testimony. Effective cross-examination is considered the remedy. Can a licensed, practicing psychologist be held to be more suspect than a chemist employed full time and paid by state law enforcement agencies? In this aspect, the ruling lacks basic

fairness.

Without the information developed by the use of hypnosis on petitioner, the defense attorneys would never have known the safety device and trigger were defective and that the gun discharged without her pulling the trigger. The information was the basis for having certain tests done, which in turn led to expert testimony which proved very conclusively that the gun was susceptible of being discharged without pulling the trigger. These characteristics of the gun were not discovered and would not have been meaningful without the recollected memory It is submitted that petitioner as a matter of right was entitled not only to get the information to the jury that the gun could discharge without her having pulled the trigger, but that in fact she believed that such was the case.

Allowing the petitioner to testify consistent with her memory at the time of the trial in no way jeopardizes the state's right to have the trier of fact weigh that testimony. The prosecutor is always free to show, for example, that the defendant may have made prior inconsistent statements; he can inquire as to the qualifications and ability of the professional who conducted the hypnotic session and to vigorously cross-examine the defendant to determine the sincerity of the belief. Petitioner submits that all of that is a fair part of due process. But to limit petitioner in what testimony she may give as a result of the hypnotic session constitutes a denial of her right to testify in her own defense. She was innocent of the crime and was literally unable to tell the jury the most direct reason why she was innocent, that her finger was never on the trigger.

Petitioner submits that this limitation on her right to testify in her own defense falls squarely within the doctrine that a state evidentiary rule may not constitutionally be applied so as to render a defendant's trial unfair. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

The applicable cases are scant. The case relied upon most heavily by the Arkansas Supreme Court, in answering the constitutional argument is *State v. Atwood*, 39 Conn. Sup. 273, 479 A.2d 259 (Conn.Super.1984). That case was a published opinion of the trial court dealing with a pre-trial motion by the defendant. The defendant claimed amnesia of the events surrounding the murder of his wife and moved that the court issue a pre-trial ruling on the admissibility of his testimony, should he decide to testify after under-

going hypnotism or sodium amytal interview designed to refresh his memory. After finding that defendant had not met his burden of proof in establishing amnesia, the court went on to discuss the issue of hypnosis and only in the final few paragraphs deals with the constitutional issue.

The trial court in *Atwood* rested its entire constitutional decision on *Greenfield v. Robinson*, 413 F.Supp. 1113 (W.D.Va.1976). But the trial court in *Atwood* apparently misunderstood the issue in *Greenfield v. Robinson*, supra. The *Atwood* court incorrectly noted that in Greenfield "the court held that the refusal to permit the defendant to testify *after* hypnosis did not infringe upon his right to due process." (emphasis added) 479 A.2d at 266. A reading of *Greenfield* indicates that the issues involved in *Greenfield* were substantially different from the issue envisioned by the *Atwood* court. Greenfield filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia, alleging among other things that he had been denied due process of law because the trial court refused and the Virginia Supreme Court upheld the refusal to permit defendant to testify while in a hypnotic trance and also refused to permit the defendant's expert witness to testify concerning statements the defendant made to him while in a hypnotic trance. The District Court noted that there was not much evidence to suggest that defendant would testify to anything of any substantial value to the case, and that what would be added would be otherwise completely uncorroborated. The Court then stated that under those peculiar circumstances, Greenfield's due process guarantees were not abrogated by the trial court's refusal to permit Greenfield to relate his story under hypnosis or an expert witness to recount what the defendant told him while under hypnosis.

In the instant cause there is very substantial evidence to corroborate what the defendant said as a result of the hypnotic session, namely that her finger was not on the trigger of the gun, and that the gun discharged accidentally. Expert testimony established that not only was that version quite possible (taking into account the weapon and its peculiar characteristics), but that it was indeed likely to discharge accidentally.

The order of the trial judge in the instant case went far beyond the ruling of the trial judge in *Greenfield*. Indeed, there was nothing

in Arkansas law to forewarn petitioner that her entire testimony would be at risk by submitting herself to hypnosis, and presumably if no notes had been taken by the hypnotist prior to the hypnotic session then none of her testimony would have been admissable, because that was what the trial court limited petitioner's testimony to. Because of persistent objections by the prosecuting attorney during the direct examination of the petitioner, which were seemingly upheld by the trial court, defense counsel was compelled to read his questions to petitioner at the trial from the hypnotist's notes.

To summarize the course of events from the point of view of Vicki Rock, she was represented by W.B. Putman, an extremely capable and experienced trial lawyer, and at his suggestion, underwent a hypnotic session with an experienced, well-educated, and highly respected psychologist. At the conslusion of that session, she found herself unable to give her testimony beyond the notes written by the psychologist, notes which the psychologist did not intend to be complete or comprehensive. By setting the scope of the petitioner's testimony according to the psychologist's notes, the Arkansas Supreme Court has given the psychologist a role in the criminal process without any due process safeguards.

Because of the increased use of hypnosis, both by law enforcement agencies and by defense attorneys, petitioner submits that the issue is one of increasing importance to the legal community. There are no Court of Appeals opinions dealing with the subject, and the Arkansas Supreme Court decision in the instant case appears to be the only case which deals squarely with a defendant's constitutional right to testify after submission to hypnosis.

Petitioner submits that even assuming constitutionality of the basic Arkansas evidentiary rule that a defendant's testimony may be so limited, then it is clear that the particular order applied to petitioner went far beyond the consitutional bounds in limiting her testimony to what was related to the hypnotist and recorded by the hypnotist in the prehypnotic interview. The evidence before the trial court at the time of the trial was that peitioner had made prior statements to the police and to her defense attorney, as well as to the psychologist in question. It was arbitrary and unreasonable, in view of other statements by petitioner, to limit her testimony strictly to those matters which the psychologist deemed significant enough to write down.

It seems axiomatic that what might be important to a professional in the field of psychology could differ greatly from matters considered important by the defense attorney. That restriction of petitioner's testimony effectively proscribed petitioner's testimony to areas considered significant by a non-professional in the area of preparation of her testimony for trial. Petitioner submits that if the testimony was to be limited at all, it should have included things remembered prior to hypnosis and stated to any of the persons who took statements, including the police and petitioner's attorneys.

Such cases that deal with the subject in great detail, such as *Contreras v. State*, 718 P.2d 129 (Alaska,1986), have dealt with the subject in the context of the identification of a suspect by a prosecution witness whose memory had been hypnotically enhanced and not with the right of a defendant to testify. Indeed, although the procedure has been in widespread use in Arkansas by law enforcement agencies and prosecuting attorneys for the identification of suspects and the enhancement of memory, not a single Arkansas case has even identified, much less refused, hypnotically refreshed testimony or identification by the prosecution. The line of cases that developed to protect criminal defendants from prosecuting witnesses should not now be used to defeat the due process rights of the petitioner.

During direct examination by petitioner's counsel, the Court vigorously enforced the order to the point that petitioner was able to say virtually nothing concerning the events which led to the death of her husband, other than to paraphrase what was on the notes of the hypnotist. On cross-examination, however, the prosecution was allowed the widest possible latitude in cross-examination over exactly those same points, using not only the notes of the psychologist, but the psychologist's previous out-of-court testimony to cross-examine petitioner. During the cross-examination, petitioner was still under the strong admonition from the Court and her attorney that she was not to say anything that she hadn't had included on the hypnotist's notes, making it virtually impossible for her to answer the prosecution's cross-examination questions and making her appear devious and unresponsive to the jury. When petitioner's defense counsel attempted to erase that impression on redirect, the rigid rule was again applied by the Court. In short, the Court allowed the prosecution to have the benefit of the rule without the responsibility or limita-

tion of it for purpose of cross-examination, which resulted in manifest harm to the presentation of petitioner's case and thus a substantial denial of due process by law.

In concluding its discussion of the due process issue, the Arkansas Supreme Court stated "any prejudice or deprivation caused to appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court", *infra*.That statement ignores the fact that not one single court decision in Arkansas, and not one Arkansas statute and not one Arkansas court rule even suggested the consequences imposed by the trial court and upheld by the Arkansas Supreme Court. The only Arkansas law to deal with the subject of refreshed recollection is Rule 612, Arkansas Uniform Rules of Evidence, and that rule suggests the permissive approach suggested by Morgan, *supra*. Petitioner submits the suggestion of self-induced error is singularly inappropriate under the circumstances, and the Arkansas Supreme Court's result is too harsh to be tolerated within the context of due process of law.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Arkansas
of April 21, 1986
Vickie Lorene ROCK, Appellant,
v.
STATE of Arkansas, Appellee.
No. CR85-215

STEELE HAYS, Associate Justice

Appellant was charged with manslaughter for the July 2, 1983 shooting of her husband. She was convicted and sentenced to ten years imprisonment and fined $10,000.

On appeal appellant's primary argument revolves around a hypnotic session conducted prior to the trial. Appellant could not remember everything about the shooting and without consulting the court nor informing the prosecutor, her attorney hired a psychiatrist to use hypnosis to induce recollection. Before hypnosis was begun, the psychiatrist, Dr. Bettye Back, interviewed appellant for an hour. Included in that interview was appellant's recollection of the shooting prior to hypnosis. No video or sound recording was made of the pre-hypnotic session, but Dr. Back made handwritten notes of the session.

The trial court ruled testimony of matters recalled by appellant due to hypnosis inadmissible because of its unreliability and because of the effect of hypnosis on cross-examination. Appellant was allowed to testify about things she remembered prior to being subjected to hypnosis though testimony resulting from post-hypnotic suggestion was excluded. We believe the trial court's ruling was correct.

I

HYPNOTICALLY REFRESHED TESTIMONY

Appellant makes two arguments relating to the court's ruling: the hypnotically refreshed testimony should have been admitted, and in the alternative, even assuming that such testimony is inadmissible, the trial court was unduly restrictive of appellant's testimony.

Divergence of Opinion on Admissibility

Hypnotically refreshed testimony has resulted in a divergence of opinion as to its proper treatment in the courtroom. Most courts agree there is some inherent unreliability in hypnotically refreshed testimony, but disagree as to how that affects admissibility. Some jurisdictions generally admit it, and do not view hypnotism as a

matter of scientific procedure, but merely a matter of credibility to be weighed by the trier of fact. See *Clark v. State* 379 So.2d 372 (Fla.Dist.Ct.App.1979); *State v. Greer*, 609 S.W.2d 423 (Mo.App.1980); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978).

A second group of cases recognizes dangers in such testimony and allows it only if certain safeguards have been followed to minimize those dangers. See *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981); *State v. Long*, 32 Wash. App. 732, 649 P.2d 845 (1982); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W. 2d 386 (1983).

A third group of cases has found hypnotically refreshed testimony so unreliable the testimony is held inadmissible per se. See *People v. Shirley*, 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982); *Collins v. Superior Court for the County of Maricopa*, 132 Ariz. 180, 644 P.2d 1266 (1982); *State v. Collins*, 52 Md. App. 186, 447 A.2d 1272 (1982); *State v. Mack*, 292 N.W.2d 764 (Minn.1980); *People v. Hughes*, 59 N.W.2d 523, 466 N.Y.S.2d 255 (1983); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983). (For a more comprehensive list of citations on the alignment of jurisdictions, see *People v. Shirley, supra: Collins v. Sup. Ct., supra; State v. Collins, supra; People v. Guerra*, 37 Cal.3d 385, 208 Cal. Rptr. 162, 690 P.2d 635 (1984).)

Current Trend Toward Exclusion

While it was said in *State v. Hurd, supra*, that a majority of courts have held hypnotically induced testimony admissible, the cases cited for that conclusion are from the previous decade. (*Hurd*,at p.91). The more recent trend is toward exclusion of such testimony. McCormick on Evidence § 206 (1984 3d ed.); *People v. Shirley, supra; State v. Atwood*, 39 Conn. Sup. 273, 479 A.2d 258 (1984). *Collins v. Sup. Ct., supra.* Typical of this trend is Maryland, which in 1968 permitted the testimony, treating the issue as one of weight rather than admissibility. *Harding v. State*, 5 Md.App. 230, 246 A.2d 302 (1968). *Harding* was the leading opinion on this point, yet in 1982 Maryland reversed its position and held that a witness who had been hypnotized may not testify to induce recollections. *Polk v. State*, 48 Md.App. 382, 427 A.2d 1041 (1981); *State v. Collins, supra.* McCormick notes that even in those jurisdictions that previously held post-hypnotic

testimony generally admissible, there is a trend toward insisting that rigorous safeguards be observed before the hypnotically refreshed memories are admissible, and "(t)he more prevalent view is that testimony about the post-hypnotic memories is not admissible." McCormick, *supra* at 623.

Courts adopting a rule of exclusion often rely on the test announced in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), that an expert witness "may not testify on the basis of scientific methodology unless the principles on which he relies have achieved general acceptance within the scientific community." Some critics contend that *Frye* is too strict and will exclude helpful and probative evidence. McCormick, *supra* § 203; Latin and White, Remote Sensory Evidence and Environmental Law, 64 Cal. L. Rev. 1300 (1976). We do not have to resolve that issue in this case, as we would find the hypnotically refreshed testimony inadmissible by either the Frye test, or some form of it, or by traditional evidentiary concepts, Unif. R. Evid. 403. To this same effect see McCormick, *supra* at 633.

Expert Opinion

While hypnosis may have gained recognition as an aid to therapy, it has not gained general acceptance as a means of ascertaining truth in the field of forensic law. Cases comprising the recent trend toward exclusion of hypnotically refreshed testimony have examined extensively the expert opinions in this field and have concluded that it is inherently unreliable and without sufficient acceptance to allow it in the courtroom. See, *People v. Shirley, supra; Collins v. Sup. Ct., supra; Commonwealth v. Kater, supra; State v. Collins, supra; People v. Quintanar,* 659 P.2d 710 (Colo.App.1982); *People v. Gonzales,* 415 Mich. 615, 329 N.W.2d 743 (1982); *People v. Hughes, supra, State v. Peoples,* 311 N.C. 515, 319 S.E.2d 177 (1984); *Commonwealth v. Nazarovitch,* 496 Pa. 97,, 436 A.2d 170 (1981); *Peterson v. State,* 448 N.E.2d 673 (Ind.1983); *Robinson v. State,* 677 P.2d 1980 (Okla.Cr.App.1984); *State v. Mack, supra, State v. Atwood,* 3 Conn. Sup. 273, 479 A.2d 258 (1984).

Dr. Bernard L. Diamond, Professor of Clinical Psychiatry, University of California at Berkeley, in his article, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness,* 68 Cal. Law Review 313 (1980), states:

> I believe that once a potential witness has been

> hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify. Hypnotized persons, being extremely suggestible, graft onto their memories fantasies or suggestions deliberately or unwittingly communicated by the hypnotist. After hypnosis the subject cannot differentiate between a true recollection and a fantasy or a suggested detail. Neither can any expert of the trier of fact. This risk is so great, in my view, that the use of hypnosis by police on a potential witness is tantamount to the destruction or fabrication of evidence. Recently, some courts have shown a healthy suspicion of the veracity of this sort of testimony. Yet even under stringent safeguards, including presentation to the trier of fact of the fullest possible information on the effects of hypnosis, the trier will not be able to sort out reality from witness fantasy and weigh this testimony properly.

People v. Shirley, supra, one of the leading cases for the rejection of hypnotically refreshed testimony, was recently reviewed in *People v. Guerra, supra.* The appellant in *Guerra* challenged the findings of *Shirley* as not being in step with recent developments in hypnosis in the scientific community. The California Supreme Court reviewed the studies and authorities since *Shirley* and found the experts even more cautious on the use of hypnosis in the courtroom. One of the more significant studies cited in *Guerra* is that of Dr. Martin T. Orne (Orne, et al,*Hypnotically Induced Testimony, In Eyewitness Testimony: Psychological Perspectives,* Wells & Loftus, edits.1984). Orne is widely cited on this issue, and it was his guidelines for the use of hypnotic testimony that were adopted by the New Jersey court in *Hurd v. State, supra. Guerra* points out Orne's current position;

> After discussing *Shirley* and the decisions that preceded and followed it, the authors agree that "The present state of scientific knowledge is consistent with the rules of a number of state supreme courts that memories retrieved through hypnosis are sufficiently unreliable that their use is precluded as eyewitness

> testimony in criminal trials...
> There is no way, however, by which anyone (including an expert with extensive experience in hypnosis) can for any particular piece of information obtained in hypnosis determine whether it is an actual memory or a confabulation. For these reasons, hypnotically induced testimony is not reliable and ought not be permitted to form the basis of testimony in court."

The dangers of hypnosis in memory retrieval are summed up in the *Guerra* opinion: the subject's capacity to judge the reality of his memories is impaired; he is apt to recall "memories" that never existed, yet be convinced those memories are real; he will produce on demand a recollection of an event which may be a compound of actual facts, irrelevant matter and highly plausible "confabulations"; hypnosis artificially increases the subject's confidence in both his true and his false memories and may enhance his credibility as a witness due to an attendant ability to increase dramatically the amount of detail, or the emotion with which those details are reported, though they may be simply "artifacts of the hypnotic process." Too, there is the likelihood that juries will place greater emphasis on testimony produced by hypnosis. See *Collins v. Sup. Ct., supra.*

Courts rejecting hypnotically refreshed testimony have been equally concerned with the effects on cross-examination, where the difficulties in memory retrieval and fabrication are compounded. The conviction on the part of the subject that he or she is stating the truth affects the truth finding process traditionally tested by cross-examination.

> The concern in the area of post-hypnotic testimony is that post-hypnotic memory may be different than pre-hypnotic memory. This memory alteration may result from purposeful or unwitting cues given by the hypnotist, the phenomenon of confabulation, and the need for the subject to achieve some sense of certainty within his or her own mind. The basic problem is that if a witness sincerely believes that what he or she is relating is the truth they become resistant to cross-examination and immune to effective

impeachment to ascertain the truth. *Collins v. Sup. Ct., supra.*

Much more could be said on the subject of hypnotically induced recollection, but we are satisfied from the more recent cases and the views of experts, the dangers of admitting this kind of testimony outweigh whatever probative value it may have.

Conditional Admissibility - the Hurd Guidelines

Appellant urges that if we do not allow hypnotically refreshed testimony unconditionally, we should adopt the guidelines of *State v. Hurd, supra.*[1] We note the appallant has not fully complied with those guidelines, but we are not inclined to follow Hurd in any case. The cases which have rejected *Hurd* have noted that some of the dangers of hypnotically induced testimony are not eliminated by the *Hurd* guidelines and others are not even addressed.[2] See *People v. Shirley, supra, Collins v. Sup. Ct., supra.*

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[1]These safeguards are well outlined by the New Jersey Supreme Court: Whenever a party in a criminal trial seeks to introduce a witness who has undergone hypnosis to refresh his memory, the party must inform his opponent of his intention and provide him with the recording of the session and other pertinent material. The trial court will then rules on the admissibility of the testimony either at a pretrial hearing or at a hearing out of the jury's presence. In reviewing the admissibility of hypnotically refreshed testimony, the trial court should evaluate both the kind of memory loss that hypnosis was used to restore and the specific technique employed based on expert testimony presented by the parties. the object of this review is not to determine whether the proffered testimony is accurate, but instead whether the use of hypnosis and the procedure followed in the particular case was a reasonably reliable means of restoring the witness' memory.

The first question a court must consider is the appropriateness of using hypnosis for the kind of memory loss encountered. The reason for a subject's lack of memory is an important factor in evaluating the reliability of hypnosis in restoring recall. According to defendant's expert, Dr. Orne, hypnosis often is reasonably reliable in reviving normal recall where there is a pathological reason, such as a traumatic neurosis, for the witness' inability to remember. Orne, supra, at 325. On the other hand, the likelihood of obtaining reason-

ably accurate recall diminishes if hypnosis is used simply to refresh a witness' memory or concerning details where there may be no recollection at all or to "verify" one of several conflicting accounts given by a witness. Id. at 324, 322. A related factor to be considered is whether the witness has any discernible motivation for not remembering or for "recalling" a particular version of the events. In either case, the possibility of creating self-serving fantasy is significant...

Once it is determined that a case is of a kind likely to yield normal recall if hypnosis is properly administered, then it is necessary to determine whether the procedures followed were reasonably reliable. Of particular importance are the manner of questioning and the presence of cues or suggestions during the trance and the post-hypnotic period . . . . (citing Orne and Others) An additional factor affecting the reliability of the procedure is the amenability of the subject to hypnosis....

To provide an adequate record for evaluating the reliability of the hypnotic procedure, and to ensure a minimum level of reliability, we also adopt several procedural requirements based on those suggested by Dr. Orne and prescribed by the trial court.... Before it may introduce hypnotically refreshed testimony, a party must demonstrate compliance with these requirements.

First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session....

Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense.

Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or in other suitable form....

Fourth, before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them....

Fifth, all contacts between the hypnotist and the subject must be recorded. This will establish a record of the preinduction interview, the hypnotic session, and the post-hypnotic period, enabling a court to determine what information or suggestions the witness may have

received....

Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the prehypnotic testing and the post-hypnotic interview... *State v. Hurd, supra.*

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[2]In deciding to discard the *Hurd* approach, the *Shirley* court noted initially that it was not persuaded that the requirements adopted in *Hurd* and other cases would eliminate each of the dangers at which they were directed.

> For example, one of the requirements set forth in *Hurd* is that all contacts between the hypnotist and the subject must be recorded for the stated purpose of enabling the trial court to determine what "cues" the hypnotist may have conveyed to the subject by word or deed; and the opinion strongly encouraged the use of videotape to make such recordings. Yet as the same opinion recognizes elsewhere, "Because of the unpredictability of what will influence a subject, it is difficult even for an expert examing a videotape of a hypnotic session to identify possible cues." If even an expert cannot confidently make that identification, it is vain to believe that a layman such as a trial judge can do so. 181 Cal Rptr. at 255. f.n. 24

The court points out that certain dangers of hypnosis are not even addressed by the *Hurd* requirements recognized elsewhere in that opinion, such as the subject losing his critical judgment and crediting memories that were formerly viewed as unreliable, confusing actual recall with confabulation and the unwarranted confidence in the validity of his ensuring recollection.

Of equal importance, to adopt the guidelines would further burden the pretrial process with no off-setting benefit: the guidelines require that the opposing party be notified of the intent to use hypnosis and be furnished a recording of any sessions; only a psychologist or psychiatrist experienced in hypnosis, and independent of either

the state or the defense, may be used; all sessions must be recorded and the trial court in a pretrial or chambers hearing must decide a number of issues determinative of whether the induced testimony should be received, such as the presence of cues or suggestions by the hyptonist. The burden of proof is by clear and convincing evidence.

In light of this questionable provative value of such proof and the risk inherent in the means by which it is retrieved, we think it would be a serious mistake to further encumber the pretrial process with the steps outlined in Hurd. We agree with the comment in *People v. Shirley, supra*:

> On the other hand, it takes little prescience to foresee that these and related issues would provide a fertile new field for litigation. There would first be elaborate demands for discovery, parades of expert witnesses, and special pretrial hearings, all with concomitant delays and expense. Among the questions our trial courts would then be expected to answer are scientific issues so subtle as to confound the experts. Their resolution would in turn generate a panoply of new claims that could be raised on appeal, including difficult questions of compliance with the "clear and convincing" standard of proof. And because the hypnotized subject would frequently be the victim, the eyewitness, or a similiar source of crucial testimony against the defendant, any errors in ruling on the admissibility of such testimony could easily jeopardize otherwise unimpeachable judgments of conviction. It our opinion, the game is not worth the candle.

Appellant's Testimony Restricted

We turn to appellant's argument that the trial court's limitations on her testimony were too restrictive. Courts that decline to permit hypnotically refreshed testimony are often faced with the difficulty of dealing with a witness who has already undergone hypnosis. The concern focuses on determining what the witness could remember prior to hypnosis and insuring that the opposing party not be deprived of the opportunity for effective cross-examination because of the in-

fluence of hypnosis. *Collins v. Sup. Ct., supra.*

The likelihood of contamination was deemed so pronounced in People v. Shirley, supra, that the court ruled a previously hypnotized witness was wholly incompetent to testify on matters dealt with while under hypnosis. However, the general response has been to permit the testimony of those recollections held prior to hypnosis, and on topics unrelated to those covered by hypnosis. To ascertain just what those memories are and to render that testimony admissible, the courts require verification by way of a detailed record by the hypnotist of the pre-hypnotic session. A preferred method is video or sound recording, *Collins v. Sup. Ct., supra,* and some courts have suggested the *Hurd* guidelines be followed when pertinent to a particular case, *People v. Hughes, supra; Collins v. Sup. Ct., supra.* The *Hurd* guidelines, or something similar, are proposed as there is still a danger that the hypnosis could be so suggestive as to affect the pre-hypnotic memory as well. Once it has been shown by clear and convincing evidence that testimony of pre-hypnotic recollection is reliable a subject may testify, but only to those memories demonstrably shown to be a product of the memory prior to hypnosis. The burden of proving the reliability is on the proponent of the testimony. *Commonwealth v. Kater, supra, People v. Shirley, supra, Collins v. Sups. Ct., supra, People v. Hughes, supra, State v. Atwood, supra.*

The trial court in this case chose the course of excluding testimony induced by hypnosis and admitting testimony of the appellant based on pre-hypnotic recollection. The difficulty was determining what that recollection was, based only on a record from the pre-hypnotic session with Dr. Back, a record admittedly incomplete. In this situation the trial court limited the appellant to what she could recall without the benefit of hypnosis, as evidenced by Dr. Back's notes and enlarged by Dr. Back's memory of her discussions with appellant before she was placed in a hypnotic state.

Appellant argues the court misapplied the rule employed by courts where hypnotically induced testimony is inadmissible and was too restrictive. Appellant, however, never demonstrated how the rule was violated. The rule simply limits the hypnotized subject's testimony to those matters demonstrably recalled prior to testimony. Any other testimony on the topic runs all the risks discussed earlier in hypnotically refreshed memories. Here, the court was in a difficult posi-

tion as the defense supplied only partial notes of the pre-hypnotic session.

Nevertheless, the appellant was allowed to testify to those items referred to in the notes and given considerable latitude in explaining them in her own words. The trial court also allowed testimony on matters Dr. Back had previously testified were covered in the pre-hypnotic session. The burden was on appellant to establish a reliable record of the testimony. She cannot now claim error because the court restricted her to the record she offered.

Dr. Back testified that during the hypnotic session she took appellant back to her childhood and brought her forward to the shooting incident. Under these circumstances, in order to avoid testimony on topics covered in the sessions that were not previously preserved the trial court could have limited appellant entirely to the notes and testimony of Dr. Back. However, to give appellant as much latitude as possible, the trial court applied that order only to the day of the shooting. Appellant complains that ruling was too restrictive and should have been limited to the explanation of the shooting incident itself. We find no support for this argument. Appellant does not deny that other events of the day were covered in the sessions, nor that they were relevant, but maintains the primary purpose of the session was to find out how the gun went off. While this may be so, the record reveals that the time covered in the sessions included the day of the shooting and, if anything, the ruling was generous. As noted in our discussion of appellant's next point, the most significant events of that day were included in Dr. Back's notes and appellant was able to testify to those matters.

Appellant suggests the better method of determining her pre-hypnotic memory would be her own recollection, and not the notes of Dr. Back. Appellant cites no authority and we think it would be circumventing the very reasons for excluding hypnotically refreshed memory to permit the witness to decide what was remembered naturally and what was induced by hypnosis. A similar suggestion was made in *Shirley*, to which the court responded:

> (I)t is the consensus of informed scientific opinion today that in no case can a person previously hypnotized to improve his recollection reliably determine whether any unverified item of his testimony

originates in his own memory or is instead a confusion or confabulation induced by the hypnotic experience. It would fly in the face of that consensus to allow a witness to be the judge of which portions of his testimony were actually produced by hypnosis.

II

CONSTITUTIONAL RIGHT TO TESTIFY

Appellant maintains the exclusion rule of hypnotically refreshed testimony should not be applied to defendants because it violates their constitutional right to testify in their own behalf. Of course, a defendant's right to testify is fundamental, but even that right is not without limits. A defendant with language difficulties, for example, may not eschew diligence and wait until the morning of trial to seek the assistance of an interpreter. *Figeroa v. State*, 244 Ark. 457, 425 S.W.2d 516 (1968). Even defendants are subject to the rules of procedure and evidence, such as hearsay, or other instances of evidentiary exclusion, e.g. evidence that is prejudicial, confusing, misleading, cumulative or time consuming.

In *Greenfield v. Robinson*, 413 F. Supp. 1113 (1976) the same argument was made by a defendant who had no recollection of the crime, a murder. He argued that hypnotic testimony was the only evidence he could offer in his defense, that it would be a violation of his constitutional rights to deny him the right to testify, citing *Chambers v. Mississippi*, 410 U.S. 284 (1973).

The cases are easily distinguishable, as the *Greenfield* court found. *Chambers* primarily found a hearsay exception for evidence offered by the defense because of reliability. The *Greenfield* court pointed out it was excluding the hypnotically induced testimony for the very reason that it was unreliable, after reviewing expert opinion on the issue:

> This court knows of no rule that requires a judge to accept evidence of uncertain value to go to a defense that is otherwise completely uncorroborated. The mere fact that a crime has no witnesses or direct evidence does not warrant a court to accept evidence that may be able to tell the trier of fact something

> about the crime, but may be of dubious quality. As a constitutional principle then this court simply finds that petitioner's due process guarantees were not abrogated by the trial court's refusal to permit the defendant to relate his story under hypnosis. *Greenfield* at 1120-21.

In *State v. Atwood, supra,* a defendant charged with the murder of his wife had no recollection of the event and made the identical argument. The *Atwood* court had not previously considered the hypnosis problem and made a finding on that issue first, aligning itself with those jurisdictions which exclude hypnotically refreshed testimony. The court then dealt with appellant's constitutional right to testify in his behalf. Citing *Greenfield, supra,* the *Atwood* court decided it was not required to accept such testimony, even if it was all the defendant had, noting it was not required to "accept evidence of uncertain value that is otherwise completely uncorroborated." The court held the defendant's constitutional rights were not violated.

We think the same reasoning applies here. Appellant's testimony was restricted only by what, in effect, are standard rules of evidence. The probative value of the proffered testimony is questionable, as we have seen, but in any case, it is substantially outweighed by the other considerations discussed. We note that appellant was in a far better position than either defendant in *Atwood* or *Greenfield* who had no testimony to offer other than hypnosis in that she was allowed to relate the substance of her version of the shooting to the jury, which she had remembered prior to hypnosis. Appellant's defense was that the shooting was an accident and this she was able to adequately relay to the jury. She testified that she and her husband were quarreling, that he pushed her against the wall, that she wanted to leave because she was frightened, and her husband wouldn't let her go. She said her husband's behavior that night was unusual, and the shooting was an accident, that she didn't mean to do it and that she would not intentionally hurt her husband.

In reality nothing was excluded that would have been of much assistance to appellant, or would have enlarged on her testimony to any significant degree. Yet given the available information on the effect of hypnosis and the attendant difficulties of such testimony, the state's desire to confine appellant's testimony to the pre-hypnotic

memories is warranted. The trial court was faced with a difficult situation at best when presented with a witness who had been hypnotized and the damage done before any ruling could be made. We think the trial court took the proper course in its ruling and any prejudice or deprivation caused to appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court. We can find no violation of her constitutional rights.

III

APPELLANT'S OUT-OF-COURT STATEMENT

Appellant alleges error in the trial court's exclusion of a statement in a police officer's report, attributed to the appellant, that she "had the gun in her hand and it went off." The statement was excluded as hearsay. Appellant relies on Unif. R. Evid. 801(d):

> Statements which are not hearsay. A statement is not hearsay if: (l) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ...(ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive...

Rule 801 does not sustain the argument, as the proffered statement does not come within the exception. For the rule to apply, the prior consistent statement must be made *before* a motive to falsify has arisen:

> (I)f the attacker has charged bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember, the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated. McCormick on Evidence, § 49 (1984).

The same principle has been explained in other words:

> Some decisions also mention that the consistent statement should have been made before the witness

would foresee its effect upon the fact issue. *Id*, n. 24.

In *Brown v. State*, 262 Ark. 298,556 S.W.2d 418 (1977), the defendant made the same argument. Brown testified that he was in Memphis at the time of the robbery. A witness was called to testify that Brown telephoned her that evening and said he was in Memphis. The statement was excluded as hearsay, Rule 801 having no application to the case, because "Brown, if guilty, had the same motive for fabrication when he made the alleged telephone call as he had when he testified in the case." We further stated in *Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980), the statements were not admissible "because the motive for fabrication was as great when the first statement was made as when the testimony was given."

Similarly, appellant's motive in describing the shooting as an accident at the time of arrest was the same as it would be when giving that testimony at trial. The court was correct in excluding the testimony as hearsay.

IV

INTRODUCTION OF HASHISH REFUSED

The final point of error concerns a small amount of hashish found in Frank Rock's shirt pocket following the shooting. There is no proof that he had used it, nor what the effects might be if he had, but appellant insists she should have been permitted to offer this proof as having relevance to the alleged violent behavior by Rock. The premise is too conjectural on this record and whether its relevance warranted acceptance was within the trial court's discretion. *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980); *Shelton v. State* 287 Ark. 322, 699 S.W.2d 728 (1986).

AFFIRMED.

Purtle, J., not participating.

Judgment of the Circuit Court of Benton County, Arkansas
February 2, 1985

State of ARKANSAS, Plaintiff

vs

Vickie Lorene ROCK, Defendant
No. CR-83-338-1

JUDGMENT

NOW on this 6th day of February, 1985, this cause coming on to be heard, the State appearing by David Clinger, Prosecuting Attorney, and Xollie Duncan, Deputy Prosecuting Attorney, and the Defendant, Vickie Lorene Rock, appearing in person and by her attorneys, E.E. Maglothin, Jr., Esther M. White, and Eugene Kelley, and the Defendant, having been previously arraigned and entered her plea of NOT GUILTY to the charge of Manslaughter - Class C Felony, all parties announced ready for trial on the 6th day of February, 1985, and a jury of twelve from the regular panel of petit jurors were impaneled and sworn to try the cause, and, having heard the evidence, the instructions of the Court, and the arguments of counsel, retired to consider its verdict. The trial having lasted four days, the Jury, on the 11th day of February, 1985, returned into courts its verdict of guilty.

Defendant comes on now, on this 22nd day of February, 1985, ready for sentencing.

IT IS, THEREFORE, CONSIDERED, ORDERED, AND ADJUDGED BY THE COURT that the Defendant, Vickie Lorene Rock, is guilty of Manslaughter - Class C Felony, and that she be and hereby is sentenced to TEN YEARS in the Arkansas Department of Correction and a TEN THOUSAND DOLLAR FINE, payable sixty days after her release from prison.

Defendant is continued on her present bond pending appeal, and is advised that notice of appeal must be filed within thirty days. Notice must include a certificate by the Court Reporter that the transcript has been ordered and necessary arrangements have been made to assure its preparation.

CIRCUIT JUDGE
ENTERED: 22 FEBRUARY 1985

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Pretrial Order of the Circuit Court of Benton County, Arkansas
December 7, 1984

State of ARKANSAS, Plaintiff

vs

Vickie Lorene ROCK, Defendant

No. CR-83-338-1

ORDER

NOW on this 26th day of November, 1984, comes on the captioned matter for pre-trial hearing, and the Court finds:

1. On September 27 and 28, 1984, Defendant was placed under hypnotic trance by Dr. Bettye Back, PhD, Fayetteville, Arkansas, for the express purpose of enhancing her memory of the events of July 2, 1983, involving the death of Frank Rock.

2. Dr. Back was professionally qualified to administer hypnosis. She was objective in the application of the technique and did not suggest by leading questions the responses expected to be made by Defendant. She was employed on an independent, professional basis. She made written notes of facts related to her by Defendant during the pre-hypnotic interview. She did employ post-hypnotic suggestion with Defendant. No one else was present during any phase of the hypnosis sessions except Dr. Back and Defendant.

3. Defendant cannot be prevented by the Court from testifying at her trial on criminal charges under the Arkansas Constitution, but testimony of matters recalled by Defendant due to hypnosis will be excluded because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters. Defendant may testify to matters remembered and stated to the examiner prior to being placed under hypnosis. Testimony resulting from post-hypnotic suggestion will be excluded.

IT IS SO ORDERED.

CIRCUIT JUDGE

ENTERED: 7 DECEMBER 1984,
NUNC PRO TUNC